BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RAFAELA ZEPEDA DEGUILLEN	)	
Claimant	)	
	)	
VS.	)	
	)	
SCHWAN'S FOOD MANUFACTURING, INC.	)	
Respondent	)	Docket No. 1,022,192
	)	
AND	)	
	)	
HARTFORD ACCIDENT & INDEMNITY CO.	)	
Insurance Carrier	)	

ORDER

Claimant requested review of the October 5, 2006 Award by Administrative Law Judge (ALJ) Bruce E. Moore. The Board heard oral argument on January 9, 2007.

APPEARANCES

D. Shane Bangerter, of Dodge City, Kansas, appeared for the claimant. Mickey W. Mosier, of Salina, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument, respondent's counsel conceded that the compensability of claimant's accident is no longer in dispute. The nature and extent of the claimant's claim, however, remains contested.

ISSUES

The ALJ found the claimant was entitled to a 14 percent functional whole body impairment. The ALJ considered but denied claimant's request for work disability as he concluded claimant failed to exercise a good faith effort to retain or find alternative employment.[1] The ALJ also denied claimant's request to have Dr. Murati's bill paid as an unauthorized medical expense inasmuch as he found Dr. Murati's report had "no relevance

[1] ALJ Award (Oct. 5, 2006) at 4.

to the issues".[2] And as a further result, the ALJ wholly disregarded Dr. Murati's opinions.

The claimant requests review of the nature and extent of her disability, both her functional impairment as well as her entitlement to a work disability. Claimant contends the ALJ erred when he disregarded the opinions expressed by Dr. Murati as lacking credibility, and that the Award should be modified to reflect a 34 percent functional impairment to the whole body. Claimant further argues that the ALJ erred in concluding she failed to demonstrate a good faith effort to retain her modified position with respondent or to find appropriate post-termination employment. To the contrary, claimant asserts that respondent exhibited a lack of good faith when it terminated her and since that time, claimant has been unsuccessful at finding employment. Accordingly, claimant believes she is entitled to a work disability based on a 100 wage loss and a 95-100 percent task loss. Finally, claimant maintains that the ALJ erred in denying her request for the unauthorized medical allowance in connection with Dr. Murati's examination.

Respondent argues that the ALJ's Award should be affirmed in all respects. Respondent contends the ALJ accurately portrayed the claimant as "disingenuous and evasive" and ultimately "less than persuasive."[3] Accordingly, respondent believes the ALJ's decision regarding claimant's lack of good faith in retaining her accommodated employment should stand. And under Kansas law, claimant is not entitled to a work disability greater than the value of her functional impairment.

As for Dr. Murati's $500 in unauthorized medical expenses, respondent contends the ALJ properly denied claimant's request as Dr. Murati's billing machinations were a thinly veiled attempt to disguise his efforts to provide a rating report, in direct contravention of K.S.A. 44-510h(b)(2).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds the ALJ's Award should be modified.

The ALJ set forth the facts and circumstances surrounding the claimant's claim in significant detail and the Board adopts that recitation of facts only to the extent that they are consistent with the findings set forth herein.

It is uncontroverted that the claimant was a productive employee from 1998 until October 2003 when she reported injury to her left (non-dominant) wrist. From that point

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[2] *Id.*

[3] *Id.* at 9.

forward respondent provided ongoing conservative treatment and claimant was assigned to various temporary modified duty assignments.

Before her injury, claimant apparently had a nearly flawless work record. And it is fair to say that after the accident, the employer/employee relationship deteriorated. Among the light duty assignments claimant was given following her report of injury she was assigned to clean tables in the lunch room. On at least one occasion claimant was accused of leaving the lunch room and going home without permission, in violation of the respondent's policies. She was verbally counseled about this issue. On another occasion, claimant accused the respondent's designated physical therapist of attempting to hurt her during the therapy session, an incident that the physical therapist denied. No action was taken against claimant regarding this alleged event, although claimant had no further physical therapy, nor did she request any further treatment. On still another occasion, claimant was accused of clocking in late. Upon investigation, it was discovered that claimant had actually been told by a supervisor that there was a 5 minute grace period for clocking in for work. Thus, no action was taken regarding claimant's alleged lack of timeliness. But because claimant apparently told her supervisor he was "full of it" during the course of this conversation, she was written up for insubordination.[4] This was the only formal written documentation of discipline contained within the record.

On April 7, 2005, claimant was found to be at maximum medical improvement by the treating physician, Dr. Philip Mills. Dr. Mills imposed the following restrictions: avoid reaching beyond 18 inches with left arm.[5] Pursuant to respondent's policy, claimant was then transferred to the Return to Work Program and given 30 days to bid on a job within Dr. Mills' restrictions. Claimant bid on a packaging break crew position which involved working at a total of 4 stations, relieving other workers over the course of a 5-1/2 hour day.

The record does not reveal the pay claimant was to receive for this 5-1/2 hour workday. Nor does the record disclose whether claimant would then be assigned to another job for the balance of the workday or whether she was only to work the 5-1/2 hour period. Thus, it is impossible to determine whether claimant sustained a wage loss when assigned to this job.

Claimant was assigned a trainer for the break crew position and for the next 4 shifts, observed the trainer performing this job. According to respondent's witnesses, the trainer performed 95 percent of the various tasks involved in this job and it was difficult to get claimant to work or to pay attention to the job. Claimant testified that the job caused her additional pain, and that respondent did nothing to help her.

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[4] It is worth noting that claimant does not regularly converse in English. At all of the proceedings and at her medical appointments she uses the services of an interpreter. Yet, nowhere in the record does claimant deny that she told her supervisor that she made this statement.

[5] Mills Depo. (May 12, 2006) at 11.

After 4 days, claimant took several previously scheduled days off, but on May 24, 2005, claimant's daughter called in and explained that claimant was unable to work due to pain in her feet. Claimant had gone to see a physician who diagnosed her with bilateral plantar fasciitis, a condition that was first diagnosed in March 2005.

When presented with the varying functional impairment ratings,[6] the ALJ appointed Dr. Reiff Brown to serve as an independent medical examiner under K.S.A. 44-510e(a). In December 2005, Dr. Brown performed an examination and reviewed claimant's medical records, including the earlier EMG results. According to Dr. Brown, claimant was not suffering from radiculopathy but he was convinced, based upon her physical complaints, that claimant was suffering from carpal tunnel syndrome in the left wrist. And he also diagnosed symptoms in the elbow and shoulder along with myofascial pain in the neck. When each of the affected areas were rated, the combined values resulted in a 14 percent functional impairment to the whole body.[7]

It is worth noting that the claimant made no mention of any problems with her feet during the course of this examination. Thus, Dr. Brown did not evaluate claimant's lower extremities, nor did he assign any permanency for those areas.

The ALJ was unpersuaded by Dr. Murati's opinions primarily because Dr. Murati's written report attributes claimant's myriad of problems to her employment with Prestige, Inc., an entity that is wholly uninvolved in this claim. The ALJ noted that "[n]owhere in his testimony does Dr. Murati attribute [c]laimant's complaints to her work duties for [r]espondent."[8] In addition, the claimant's complaints to Dr. Murati and their purported connection to her work activities were far more expansive than those made to any of the other physicians involved in this claim.

The ALJ went further and refused claimant's request for reimbursement of Dr. Murati's bills as an unauthorized medical allowance explaining:

> A report was issued, including treatment recommendations, but there is no evidence that those treatment recommendations were ever submitted to Respondent, or were ever ***intended*** to be submitted to Respondent. Instead, Claimants' counsel subsequently paid an additional, relatively nominal, fee for a report containing a rating. Without evidence that treatment recommendations were actually communicated to Respondent, with a request for the treatment

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[6] Dr. Mills rated claimant with a 5 percent permanent impairment of function to the body as a whole for myofascial pain affecting the left shoulder musculature, extending into the neck while Dr. Murati rated claimant at 34 percent permanent of function to the body as a whole for a variety of conditions, including bilateral carpal tunnel and bilateral plantar fasciitis.

[7] All ratings are based upon the 4th edition of the *Guides*.

[8] ALJ Award (Oct. 5, 2006) at 11.

> recommended, the court concludes that the referral to Dr. Murati and his examination appear to have been structured with an eye toward having Respondent pay for Dr. Murati's rating opinion. This would be an inappropriate use of the unauthorized medical allowance provided in **K.S.A. 44-510h(b)(2)**.[9]

The Board has considered the ALJ's decision with respect to the unauthorized medical allowance and finds that it must be reversed. The statute, K.S.A. 44-510h(b)(2) does not require a claimant to demonstrate any intention to follow through on the medical recommendations or to necessarily demand those from respondent. The statute merely gives an injured employee an opportunity to obtain a second opinion. There are any number of reasons why an employee might decide not to follow up on a physician's suggestions. And there is no statutory authority to exclude this claimant from recovering that cost simply because she chose not to take advantage of Dr. Murati's recommendations. While it is true that it might appear that the claimant is doing indirectly what is directly prohibited by statute, namely obtaining a rating report at respondent's expense, there is a separate report which contains the ultimate functional impairment rating. And claimant is not requesting that the expense associated with that report be reimbursed. This procedure has been approved by both the Board and the Court of Appeals.[10] Accordingly, the ALJ's Award is reversed to the extent that he denied claimant reimbursement for the $500 in unauthorized medical expense associated with Dr. Murati's examination.

The Board further notes that the ALJ was critical of Dr. Murati's report in that he referenced claimant's position with *Prestige, Inc.*, and its causal connection to claimant's work activities. Upon examination of Dr. Murati's report, it is true that Dr. Murati ultimately attributed claimant's physical problems, both the bilateral carpal tunnel and the bilateral plantar's fasciitis to her work with an employer that is not involved in this litigation (an entity that she clearly did not work for). However, that same report twice mentions the respondent by name. And given Dr. Murati's frequent services to the workers compensation bar, it is clear that this was a typographical and/or transcription error, something that often occurs.[11] For this reason, the Board is unwilling to wholly disregard Dr. Murati's opinions, although it is worth noting that his opinions are vastly different than those offered by the other physicians who have testified in this case.

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[9] *Id.* at 13.

[10] *Thompson v. U.S.D. 512*, No. 1,018,385, 2006 WL 2934925 (Kan. WCAB Sept. 15, 2006); *Newton v. Swan Manor, Inc.*, No. 213,225, 2002 WL 1838729 (Kan. WCAB July 29, 2002); *Castro v. IBP, Inc.*, 29 Kan. App. 2d 475, 30 P.3d 1033 (2001).

[11] Even the Award had a typographical error. At one point the ALJ referred to Dr. Brown when he clearly meant to refer to Dr. Murati. (Award at 11.)

As for claimant's functional impairment, the Board has considered the varying opinions offered by Drs. Mills, Brown and Murati and concludes the ALJ's adoption of Dr. Brown's opinion, 14 percent to the whole body, is appropriate and should be affirmed. The Board has considered Dr. Murati's opinions with respect to claimant's bilateral carpal tunnel complaints as well as the bilateral plantar fasciitis and concludes that although the left wrist, arm and neck are certainly involved in this claim, as evidenced by Dr. Mills and Brown's opinions, claimant has failed to prove a causal connection between her right arm and bilateral feet complaints and her work activities. Dr. Murati's testimony does not explain how, with a date of accident of October 10, 2003, in which claimant expressed an onset of pain to her left wrist, she suffered accidental injury to her feet, resulting in bilateral plantar's fasciitis or carpal tunnel complaints in her right wrist. Curiously, these right arm/wrist and bilateral feet complaints are nowhere to be found in the examinations performed by Dr. Mills or Dr. Brown. Only Dr. Murati mentions them and causally relates them to claimant's work injury. Based on a totality of these facts, the Board finds the 14 percent to the body as a whole awarded by the ALJ for claimant's left upper extremity and myofascial pain syndrome affecting the shoulders to be appropriate and hereby affirmed. Likewise, the Board adopts Dr. Brown's restrictions which are set forth in the Award.[12]

When, as here, an injury does not fit within the schedules of K.S.A. 44-510d, permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a), which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross**

[12] ALJ Award (Oct. 5, 2006) at 6.

> **weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

This statute must be read in light of *Foulk*[13] and *Copeland*.[14] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a) (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than actual earnings when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.[15]

The Act neither imposes an affirmative duty upon the employer to offer accommodated work nor does it impose an affirmative duty upon the employee to request accommodated work. Whether claimant requested accommodated work from an employer is just one factor in determining whether the claimant made a good faith attempt to obtain appropriate work.[16]

The good faith of an employee's efforts to find or retain appropriate employment is determined on a case-by-case basis.[17] An employee is not required to seek post-injury accommodated employment with the employer in every case.[18] An employee may be entitled to a work disability after seeking other employment when the injury prevents him or her from continuing to perform his or her job duties for the employer.[19]

The Kansas Appellate Courts have interpreted K.S.A. 44-510e(a) to require workers to make a good faith effort to continue their employment post injury. The Court has held

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[13] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[14] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[15] *Id.* at 320.

[16] *Oliver v. Boeing Company*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

[17] *Parsons v. Seaboard Farms, Inc.*, 27 Kan. App. 2d 843, 9 P.3d 591 (2000).

[18] *Helmstetter v. Midwest Grain Products, Inc.*, 29 Kan. App. 2d 278, 28 P.3d 398 (2001).

[19] See *Oliver v. Boeing Company*, 26 Kan. App. 2d 74

a worker who is capable of performing accommodated work should advise the employer of his or her medical restrictions and should afford the employer a reasonable opportunity to adjust the job duties to accommodate those restrictions. Failure to do so is evidence of a lack of good faith.[20] Additionally, permanent partial general disability benefits are limited to the functional impairment rating when the worker refuses to attempt or voluntarily terminates a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage.[21]

Here, respondent maintains that claimant exhibited a lack of good faith when she walked away from her accommodated position on the break crew and because of that voluntary decision, she should be limited in her recovery to a functional impairment, the idea being that she walked away from a comparable job.[22] There are, however, a number of flaws in respondent's argument.

First, there is no evidence that the break crew job represented a job at comparable wages. All the record shows is that the job was for 5-1/2 hours per day, nothing more. Thus, it would be difficult to conclude that claimant abandoned a position that paid at least 90 percent of her preinjury average weekly wage. And the Board concludes that the party asserting that claimant is capable or obligated to perform an accommodated position (and thus not entitled to a work disability) bears the burden of establishing the accommodated position affords a comparable wage.

Second, while Dr. Mills concluded claimant was capable of performing the accommodated break crew job if the fill position was omitted from her rotation (as that job exceeded her reaching restrictions), respondent's own representatives testified that this break crew job contemplated someone who was able to do all 4 of the job rotations and not just 3. And while they could accommodate those restrictions for a period of weeks, they could not do so for much more than a month. Thus, claimant's accommodation was not permanent or longstanding.

Third, respondent terminated claimant from the break crew position. Although respondent argues that it terminated claimant because she essentially wasn't putting forth an earnest effort at the job, the termination letter to claimant by respondent clearly indicates it can no longer accommodate her restrictions. The letter says nothing about her

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[20] See, e.g., *Id.*; *Lowmaster v. Modine Mfg. Co.*, 25 Kan. App. 2d 215, 962 P.2d 1100, *rev. denied* 265 Kan. 885 (1998).

[21] *Cooper v. Mid-America Dairymen*, 25 Kan. App. 2d 78, 957 P.2d 1120, *rev. denied* 265 Kan. 884 (1998).

[22] *Ramirez v. Excel Corp.*, 26 Kan. App. 2d 139, 979 P.2d 1261, *rev. denied* 267 Kan. 889 (1999); *Tran v. Excel Corp.*, No. 150, 280 and 154,195, 2001 WL 1191740 (Kan. WCAB Sept. 28, 2001); *Strang v. The Boeing Company*, No. 216,794, 2001 WL 1669694 (Kan. WCAB Nov. 30, 2001).

lack of effort. Respondent's own writing clearly indicates it is no longer able to accommodate claimant's restrictions.

For these reasons, the Board finds that claimant is entitled to a work disability under K.S.A. 44-510e(a). Respondent terminated claimant for the reason that it could no longer accommodate her restrictions, restrictions that resulted from her work-related injury with this respondent. She has been forced into the workforce and her employment options are, in view of her past work history, limited. Claimant has a limited educational background and has worked for only 2 employers in the past 15 years, most of that time spent in respondent's employ.

According to each of the physicians, the claimant bears a 95-100 percent task loss. Dr. Murati's opinion is 100 percent, owing to the fact that he included her bilateral plantar's fasciitis in the task loss mix, while the other two physicians opined that claimant had a 95 percent task loss. The Board concludes that claimant sustained a 95 percent task loss as a result of her injury.

Turning now to the wage loss component of the analysis, the Board finds that claimant failed to make a good faith effort to find appropriate employment after she was terminated from her position on the break crew. Up to that point, claimant may have been less than cooperative, but she was reporting to work and at no time did respondent commence progressive discipline against her. Unfortunately, it is impossible to determine, without speculating, as to what her wage was during this period and whether there was a corresponding wage loss. And it is unclear from the record as to whether she was continuing to get paid after she worked the 4 days in the break crew position. She was not terminated until June 6, 2005, but she was on vacation, and once taken off work by another physician for her foot condition, the record does not disclose whether she sustained a wage loss during this period and if so, how much. Thus, the Board finds that for the period May 4, 2005 to June 6, 2006 claimant has failed to sustain her burden of establishing a wage loss in excess of 10 percent which would qualify her for a work disability under K.S.A. 44-510e(a).

However, as of the date of her termination, she sustained a 100 percent wage loss. That finding is tempered by the Board's further finding that claimant failed to make a good faith effort to find appropriate employment. Claimant testified that she has applied at a number of places, but her testimony is too vague to permit a finding of a good faith job search. Accordingly, the Board is authorized to impute a wage to claimant and does so in the amount of $5.15 per hour, the federal minimum wage, for 40 hours per week. The Board imputes this wage with the understanding that claimant has permanent restrictions, limited education, minimal transferrable skills along with a language barrier. This leaves claimant with a wage loss of 54 percent commencing June 6, 2005, a percentage that qualifies her for a work disability. And when that figure is averaged with the 95 percent task loss, claimant is left with a 75 percent work disability. The Award is modified to reflect the 75 percent work disability commencing June 6, 2005.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated October 5, 2006, is reversed in part, affirmed in part and modified in part as follows:

The claimant is entitled to 58.10 weeks of permanent partial disability compensation at the rate of $295.27 per week or $17,155.19 for a 14 percent functional disability followed by 253.15 weeks of permanent partial disability compensation at the rate of $137.34 per week or $34,767.62 for a 75 percent work disability, making a total award of $51,922.81.

As of January 31, 2007 there would be due and owing to the claimant 58.10 weeks of permanent partial disability compensation at the rate of $295.27 per week in the sum of $17,155.19 plus 86.42 weeks of permanent partial disability compensation at the rate of $137.34 per week in the sum of $11,868.92 for a total due and owing of $29,024.11, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $22,898.70 shall be paid at the rate of $137.34 per week for 166.73 weeks or until further order of the Director.

The claimant is also entitled to $500 in unauthorized medical. All other findings are hereby adopted by the Appeals Board as if fully set forth herein to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this _____ day of January, 2007.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: D. Shane Bangerter, Attorney for Claimant
Mickey W. Mosier, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge

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Claimant	)	
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SCHWAN'S FOOD MANUFACTURING, INC.	)	
Respondent	)	Docket No. 1,022,192
	)	
AND	)	
	)	
HARTFORD ACCIDENT & INDEMNITY CO.	)	
Insurance Carrier	)	

ORDER NUNC PRO TUNC

It has come to Board's attention that there is a clerical error within the Board's January 31, 2007 Order in this matter. Specifically, in the calculation of the award, the rate of the permanent partial impairment was inadvertently calculated at the incorrect rate. That paragraph of the Order (on page 10) should read as follows:

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated October 5, 2006, is reversed in part, affirmed in part and modified in part as follows:

The claimant is entitled to 58.10 weeks of permanent partial disability compensation at the rate of $295.27 per week or $17,155.19 for a 14 percent functional disability followed by 253.15 weeks of permanent partial disability compensation at the rate of $297.53 per week or $75,319.72 for a 75 percent work disability, making a total award of $92,474.91.

As of February 6, 2007 there would be due and owing to the claimant 58.10 weeks of permanent partial disability compensation at the rate of $295.27 per week in the sum of $17,155.19 plus 87.28 weeks of permanent partial disability compensation at the rate of $297.53 per week in the sum of $25,968.42 for a total due and owing of $43,123.61, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $49,351.30 shall be paid at the rate of $297.53 per week for 165.87 weeks or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of February, 2007.

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BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: D. Shane Bangerter, Attorney for Claimant
Mickey W. Mosier, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge